Tropika Istimewa Development Sdn Bhd v Wong Hang Fah & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCvC)(W)1552–10 OF 2020
RAVINTHRAN, MOHD NAZLAN AND AHMAD KAMAL JJCA
22 MAY 2025

Land Law — Sale and purchase agreement — Acquisition of properties through private lease scheme — Appellant sold lease of property to respondents — Whether second actor theory applicable — Whether case of Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281 was to be applied prospectively — Whether respondents' challenges to validity of approvals ought to be brought through judicial review — Whether private lease scheme and sale and purchase agreement invalid and/or in contravention of Housing Development (Control and Licensing) Act 1966, the Housing Development (Control and Licensing) Regulations 1989, National Land Code and Strata Titles Act 1985 — Whether respondents' cross-appeal ought to be allowed

The respondents ('plaintiffs') were the purchasers of a condominium unit ('the property') in a housing development project known as The Meridin @ Medini ('the project'). The appellant ('defendant') was the developer of the project situated at a freehold land at Medini Iskandar Malaysia, a special economic zone located in Iskandar Puteri, Johor ('the land'), owned by a private corporation known as Iskandar Investment Bhd ('IIB'). A lease was granted to Medini Land Sdn Bhd ('Medini') for a period of 99 years commencing from 15 April 2013 and expiring on 14 April 2112. The Land Office of Johor and Iskandar Regional Development Authority ('IRDA') had established guidelines for foreign acquisition of properties in Medini Iskandar Malaysia. This guideline was established to regulate the sale and purchase transactions for the projects in Medini Iskandar Malaysia by implementing the concept of a private lease scheme, including the transfer of ownership to foreigners ('private lease scheme'), given that Medini Iskandar Malaysia was a special project and development. By a lease purchase agreement signed between Medini and the defendant, Medini agreed to sell the lease to the defendant. The defendant was granted the right to develop the land as a housing development and to sell the lease on the units to the plaintiffs. By sale and purchase agreement(s) executed between the respective plaintiffs and the defendant ('SPA'), the defendant agreed to sell the lease of the units (as opposed to a sale of property) to the plaintiffs. The plaintiffs later learnt that the SPA failed to comply with the provisions of the law relating to the housing development, which caused the plaintiffs to incur losses and/or damages. The plaintiffs thus instituted a civil

suit against the defendant claiming for: (a) a declaration that the SPA was invalid and/or in contravention of the Housing Development (Control and Licensing) Act 1966 ('the HDA'), the Housing Development (Control and Licensing) Regulations 1989 ('the HDR'), the National Land Code ('the NLC') and the Strata Titles Act 1985 ('the STA'); (b) a declaration that the defendant was required to comply and shall be bound by the terms and conditions as prescribed in Schedule H of the HDR; (c) an order that the defendant shall pay the plaintiffs damages to be assessed by the court as a result of the misrepresentation and/or breach of the terms and conditions as prescribed in Schedule H of the HDR; and (d) an order that the defendant shall pay the plaintiffs liquidated ascertained damages ('LAD') for late delivery of vacant possession of their units. The defendant contended, among others, that based on a letter from Jabatan Perumahan Negara, Kementerian Perumahan dan Kerajaan Tempatan ('KPKT'), the defendant had obtained an exemption from complying with the prescribed statutory format under Schedule H that allowed the defendant to sell the lease on the units (instead of a sale of property) to the plaintiffs and for an extension of time to deliver vacant possession from the prescribed statutory period of 36 months to 48 months. The High Court, ruling in favour of the plaintiffs, found that: (i) in both regs 11(1) and (3) of the HDR, there was no provision for the controller allowing the defendant to enter into the SPA with the plaintiffs for the sale of the lease as opposed to a sale of the property. That being the case, the SPA was in breach of the HDA and HDR; (ii) the power given to the controller under reg 11(3) did not extend to giving exemptions for non-compliance with reg 11 of the HDR to alter the terms and conditions of the SPA from a sale of a property to a sale of a lease which violated Schedule H; and (iii) the defendants had misrepresented the status of the property to the plaintiffs ie that they had entered into a sale to purchase a property and not a contract to purchase a lease. Dissatisfied, the defendant filed this appeal. The plaintiffs cross-appealed, claiming a variation to the amount of the LAD granted. The defendant submitted that: (1) the second actor theory was engaged where the defendant as the second actor obtained and relied upon the KPKT's letter by the Ministry of Housing as well as the guidelines by the authorities (the approvals by the authorities); (2) the Federal Court case of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee') was to be applied prospectively, not retrospectively as decided in *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other appeals* [2024] 5 MLJ 897 ('Prema Bonanza'); (3) the plaintiffs, as strangers, could not initiate this proceeding as collateral to attack the approvals by the authorities and were obliged to challenge directly the same against the first actor of authorities, which they failed to do; (4) the issues raised by the plaintiffs had been rendered moot following the issuance of the strata title; and (5) the plaintiffs were aware of the private lease scheme and voluntarily entered into the SPA, knowing very well the nature of the transaction.

Held, allowing the appeal and dismissing the cross-appeal:

(1) Notwithstanding the declaration of invalidity of Controller's extension as established in Ang Ming Lee, such a declaration should not retrospectively affect parties who had relied in good faith on the validity of the said extension prior to it being declared unlawful — the second actor theory. The first act referred to the approval of the extension of time and exemption under reg 11(3) of the HDR. The second act was the SPA in reliance on the Ministry of Housing's extension and exemption's approval as well as the guidelines. Even though the KPKT's approval was declared void following the decision of the Federal Court in *Ang Ming Lee* in 2019 ie some six years later, however, it shall not render the second act invalid as there was a reliance on validity of the first act, when the second act was performed. The defendant as the developer, relied upon the KPKT's act of granting the extension of time to deliver vacant possession. There would be substantial injustice if the act of the defendant was found to be void because of the invalidity of the first act of the Controller. This was not a case where the defendant had failed to fulfil its obligations under the SPA. On the contrary, the defendant delivered vacant possession within the agreed 48 months period specified in the SPA. By applying the second actor theory, developers as the second actor, who relied on the KPKT's approvals as well as the guidelines in good faith, acted lawfully by completing the project within the timeframes expressly stipulated in the SPA. This reliance was unaffected by the subsequent declaration of invalidity of the first act. To declare the second act void solely because of the invalidity of the first act — despite the second actor's honest and reasonable presumption of its validity — would open the floodgates to litigation, cause substantial injustice, and create administrative chaos. In circumstances where such honest reliance existed, the second act should be upheld as valid notwithstanding the legal defects of the first act (see paras 29, 31, 35–36 & 38–40).

(2) The High Court judge had erred in applying the Court of Appeal case of *Ang Ming Lee* and also holding that regs 11(1) and (3) of the HDR did not allow the defendant to enter or alter SPA with the plaintiffs for the sale of lease. The Federal Court in the case of *Prema Bonanza* decided that *Ang Ming Lee* was to be applied 'prospectively'. Thus, the validity of the amendments to the SPA, which were made in reliance on the KPKTs approvals, as well as the specific guidelines issued by the authorities was upheld (see paras 41–43).

(3) Challenging the Controller's authority to grant exemptions under reg 11(1) of the HDR should have been brought through a judicial review application. Accordingly, any challenge to the validity of KPKT's approval should have been brought through a judicial review application, with KPKT properly added as a party. Moreover, the plaintiffs' claim of

deprivation of the rights to be heard was without merit, and the plaintiffs were estopped from raising this argument and/or disputing the validity of the KPKT's approval, as the underlying basis for its issuance was never contested (see paras 45, 48 & 52).

(4) The issuance of the strata title to the plaintiffs, which formally recognised them as leaseholders for a term of 99 years, nullified the plaintiffs' claim on the legality of the sale of the lease. This act of registration, coupled with the clearly defined nature of the leasehold, rendered the objections raised by the plaintiffs entirely academic and devoid of merit. It was wrong for the plaintiffs to consider themselves as the sub-lessees and claim that the SPA was in contravention of s 221(3)(b) of the NLC because: (a) s 221 of the NLC granted power to the proprietors ie IIB to grant a lease for a maximum term of 99 years over the land on which Project Medini was built; (b) the lease was granted to Medini, which was subsequently sold to the defendant; and (c) pursuant to ss 218 and 219 of the NLC, the lease could be transferred and the interest of any lessee shall pass and vest in the transferee upon registration of the transfer. Therefore, the plaintiffs' claim that they had been misrepresented and did not obtain the proprietorship of the property could not be true. Further, under s 340 of the NLC, the interest of any person in a registered title was indefeasible, further solidifying the legitimacy of the lease transaction and the interests of the plaintiffs over their respective property (see paras 57–60).

(5) This private lease scheme did not contravene any lease periods under the NLC and the STA. The defendant had applied for the strata title and had indeed been issued following the guidelines set by the IRDA. Both the STA and the NLC did not prohibit the assignment of rights over the property by the proprietor to the plaintiffs. The SPA had been structured in compliance with the ownership guidelines established by IRDA, reflecting adherence to the regulatory framework. Therefore, the plaintiffs' claims of breach of NLC and STA were devoid of merit (see paras 61, 66, 68 & 70).

(6) The plaintiffs' purchase of the leases over the parcels, as well as the exemption from using Schedule H granted by the authorities, were clearly specified in the SPA. The principle of estoppel prevented the plaintiffs from challenging the validity of the lease terms when they had already benefited from the very structure they now seek to dispute. The terms of the sale, including the fact that they were purchasing a lease, were made abundantly clear. The plaintiffs, as purchasers who secured a loan from the bank, were fully aware of the nature of the property they were acquiring. Therefore, any claim of misrepresentation was entirely unfounded (see paras 71, 74, 76 & 80–81).

(7) Since the vacant possession of the property was duly delivered to the respective plaintiffs since 2017, the cross-appeal by the plaintiffs had now become academic (see para 90).

[Bahasa Malaysia summary

Responden ('plaintif') adalah pembeli unit kondominium ('hartanah') dalam projek pembangunan perumahan yang dikenali sebagai The Meridin @ Medini ('projek'). Perayu ('defendan') adalah pemaju projek yang terletak di atas tanah pegangan bebas di Medini Iskandar Malaysia, sebuah zon ekonomi khas yang terletak di Iskandar Puteri, Johor ('tanah'), yang dimiliki oleh sebuah perbadanan swasta dikenali sebagai Iskandar Investment Bhd ('IIB'). Pajakan telah diberikan kepada Medini Land Sdn Bhd ('Medini') untuk tempoh 99 tahun bermula dari 15 April 2013 dan tamat pada 14 April 2112. Pejabat Tanah Johor dan Pihak Berkuasa Pembangunan Wilayah Iskandar ('APBWPI') telah menetapkan garis panduan untuk pemerolehan hartanah asing di Medini Iskandar Malaysia. Garis panduan ini diwujudkan untuk mengawal selia transaksi jual beli bagi projek-projek di Medini Iskandar Malaysia dengan melaksanakan konsep skim pajakan persendirian, termasuk pemindahan pemilikan kepada warga asing ('skim pajakan persendirian'), memandangkan Medini Iskandar Malaysia adalah projek dan pembangunan khas. Melalui perjanjian beli pajakan yang ditandatangani antara Medini dan defendan, Medini bersetuju untuk menjual pajakan tersebut kepada defendan. Defendan diberikan hak untuk membangunkan tanah sebagai pembangunan perumahan dan menjual pajakan unit-unit tersebut kepada plaintif. Melalui perjanjian jual beli ('PJB') yang dilaksanakan antara plaintif dan defendan, defendan bersetuju untuk menjual pajakan unit-unit (berbanding penjualan hartanah) kepada plaintif. Plaintif kemudiannya mendapati bahawa PJB gagal mematuhi peruntukan undang-undang berkaitan pembangunan perumahan, yang menyebabkan plaintif menanggung kerugian dan/atau kerosakan. Oleh itu, plaintif memulakan tuntutan sivil terhadap defendan menuntut: (a) suatu pengisytiharan bahawa PJB adalah tidak sah dan/atau melanggar Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('APP'), Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1989 ('PPP), Kanun Tanah Negara ('KTN') dan Akta Hakmilik Strata 1985 ('AHS'); (b) satu pengisytiharan bahawa defendan dikehendaki mematuhi dan terikat dengan terma dan syarat seperti yang ditetapkan dalam Jadual H APP; (c) satu perintah bahawa defendan hendaklah membayar ganti rugi kepada plaintif yang akan ditaksir oleh mahkamah akibat salah nyata dan/atau pelanggaran terma dan syarat seperti yang ditetapkan dalam Jadual H PPP; dan (d) satu perintah bahawa defendan hendaklah membayar ganti rugi ditetapkan ('LAD') kepada plaintif untuk kelewatan penyerahan milikan kosong unit mereka. Defendan berhujah, antara lain, bahawa berdasarkan surat daripada Jabatan Perumahan Negara, Kementerian Perumahan dan Kerajaan Tempatan ('KPKT'), defendan telah memperoleh pengecualian daripada pematuhan format berkanun yang ditetapkan di bawah Jadual H yang membenarkan

defendan menjual pajakan unit-unit (berbanding penjualan hartanah) kepada plaintif dan untuk lanjutan masa penyerahan milikan kosong daripada tempoh statutori 36 bulan kepada 48 bulan. Mahkamah Tinggi, yang memutuskan berpihak kepada plaintif, mendapati bahawa: (i) dalam kedua-dua peraturan 11(1) dan (3) PPP, tiada peruntukan bagi Pengawal membenarkan defendan memasuki PJB dengan plaintif untuk penjualan pajakan berbanding penjualan hartanah. Oleh itu, PJB melanggar APP dan PPP; (ii) kuasa yang diberikan kepada pengawal di bawah peraturan 11(3) tidak meliputi pemberian pengecualian untuk ketidakpatuhan peraturan 11 PPP bagi mengubah terma dan syarat PJB daripada penjualan hartanah kepada penjualan pajakan yang melanggar Jadual H; dan (iii) defendan telah salah menyatakan status hartanah kepada plaintif iaitu bahawa mereka telah membuat penjualan untuk membeli hartanah dan bukan kontrak untuk membeli pajakan. Tidak berpuas hati, defendan memfailkan rayuan ini. Plaintif pula memfailkan rayuan balas, menuntut variasi kepada jumlah LAD yang diberikan. Defendan berhujah bahawa: (1) teori pelaku kedua diguna pakai di mana defendan sebagai pelaku kedua memperoleh dan bergantung kepada surat KPKT daripada Kementerian Perumahan serta garis panduan oleh pihak berkuasa (kelulusan oleh pihak berkuasa); (2) kes Mahkamah Persekutuan *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee') perlu digunapakai secara prospektif, bukan retrospektif seperti yang diputuskan dalam *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other appeals* [2024] 5 MLJ 897 ('Prema Bonanza'); (3) plaintif, sebagai pihak ketiga, tidak boleh memulakan prosiding ini sebagai sandaran untuk menyerang kelulusan oleh pihak berkuasa dan wajib mencabar secara langsung perkara yang sama terhadap pelaku pertama pihak berkuasa, yang gagal mereka lakukan; (4) isu-isu yang dibangkitkan oleh plaintif telah dipertikaikan berikutan pengeluaran hak milik strata; dan (5) plaintif menyedari skim pajakan persendirian dan secara sukarela memasuki PJB, mengetahui dengan jelas sifat transaksi tersebut.

Diputuskan, membenarkan rayuan dan menolak rayuan balas:

(1) Walaupun pengisytiharan ketaksahan lanjutan pengawal seperti yang ditetapkan dalam *Ang Ming Lee*, pengisytiharan sedemikian tidak sepatutnya memberi kesan secara retrospektif kepada pihak-pihak yang telah bergantung dengan suci hati kepada kesahihan lanjutan tersebut sebelum ia diisytiharkan tidak sah — teori pelaku kedua. Kelakuan pertama merujuk kepada kelulusan lanjutan masa dan pengecualian di bawah peraturan 11(3) PPP. Kelakuan kedua adalah PJB yang bergantung kepada kelulusan lanjutan dan pengecualian Kementerian Perumahan serta garis panduan. Walaupun kelulusan KPKT diisytiharkan tidak sah berikutan keputusan Mahkamah Persekutuan dalam kes *Ang Ming Lee* pada tahun 2019 iaitu kira-kira enam tahun

kemudian, namun, ia tidak akan menjadikan kelakuan kedua tidak sah kerana terdapat pergantungan kepada kesahihan kelakuan pertama apabila kelakuan kedua dilaksanakan. Defendan sebagai pemaju, bergantung kepada kelakuan KPKT yang memberikan lanjutan masa untuk menyerahkan milikan kosong. Akan berlaku ketidakadilan yang besar jika tindakan defendan didapati tidak sah disebabkan ketaksahan tindakan pertama pengawal. Ini bukanlah kes di mana defendan gagal memenuhi kewajipannya di bawah PJB. Sebaliknya, defendan menyerahkan milikan kosong dalam tempoh 48 bulan yang dipersetujui seperti yang dinyatakan dalam PJB. Dengan menggunakan teori pelaku kedua, pemaju sebagai pelaku kedua, yang bergantung kepada kelulusan KPKT serta garis panduan dengan suci hati, bertindak secara sah dengan menyiapkan projek dalam tempoh masa yang ditetapkan secara jelas dalam PJB. Pergantungan ini tidak terjejas oleh pengisytiharan ketaksahan kelakuan pertama yang berikutnya. Mengisytiharkan kelakuan kedua tidak sah semata-mata kerana ketaksahan kelakuan pertama — walaupun terdapat anggapan jujur dan munasabah pelaku kedua tentang kesahihannya — akan membuka pintu kepada litigasi berleluasa, menyebabkan ketidakadilan yang besar, dan mewujudkan kekacauan pentadbiran. Dalam keadaan di mana pergantungan jujur sedemikian wujud, kelakuan kedua harus dikekalkan sebagai sah walaupun terdapat kecacatan undang-undang kelakuan pertama (lihat perenggan 29, 31, 35–36 & 38–40).

(2) Hakim Mahkamah Tinggi telah terkhilaf dalam mengaplikasikan kes Mahkamah Rayuan *Ang Ming Lee* dan juga memutuskan bahawa peraturan 11(1) dan (3) APP tidak membenarkan defendan untuk memasuki atau mengubah PJB dengan plaintif untuk penjualan pajakan. Mahkamah Persekutuan dalam kes *Prema Bonanza* memutuskan bahawa *Ang Ming Lee* perlu diaplikasikan secara 'prospektif'. Oleh itu, kesahihan pindaan kepada PJB, yang dibuat berdasarkan kelulusan KPKT, serta garis panduan khusus yang dikeluarkan oleh pihak berkuasa, dikekalkan (lihat perenggan 41–43).

(3) Cabaran terhadap kuasa pengawal untuk memberikan pengecualian di bawah peraturan 11(1) APP sepatutnya dibawa melalui permohonan semakan kehakiman. Oleh itu, sebarang cabaran terhadap kesahihan kelulusan KPKT sepatutnya dibawa melalui permohonan semakan kehakiman, dengan KPKT ditambah sebagai pihak yang sewajarnya. Selain itu, tuntutan plaintif mengenai perlucutan hak untuk didengar adalah tidak berasas, dan plaintif dihalang daripada membangkitkan hujahan ini dan/atau mempertikaikan kesahihan kelulusan KPKT, kerana asas penerbitannya tidak pernah dicabar (lihat perenggan 45, 48 & 52).

(4) Pengeluaran hak milik strata kepada plaintif, yang secara rasmi

mengiktiraf mereka sebagai pemegang pajakan untuk tempoh 99 tahun, membatalkan tuntutan plaintif mengenai kesahihan penjualan pajakan tersebut. Tindakan pendaftaran ini, ditambah dengan sifat pajakan yang jelas ditakrifkan, menjadikan bantahan yang dibangkitkan oleh plaintif sepenuhnya akademik dan tidak berasas. Adalah salah bagi plaintif untuk menganggap diri mereka sebagai penerima pajak dan mendakwa bahawa PJB melanggar s 221(3)(b) KTN kerana: (a) s 221 KTN memberikan kuasa kepada pemilik iaitu IIB untuk memberikan pajakan untuk tempoh maksimum 99 tahun ke atas tanah di mana Projek Medini dibina; (b) pajakan itu diberikan kepada Medini, yang kemudiannya dijual kepada defendan; dan (c) menurut s 218 dan 219 KTN, pajakan boleh dipindah milik dan kepentingan mana-mana penerima pajak akan beralih dan diletakkan kepada penerima pindah milik setelah pendaftaran pindah milik. Oleh itu, tuntutan plaintif bahawa mereka telah disalahnyatakan dan tidak memperoleh pemilikan hartanah tidak mungkin benar. Tambahan pula, di bawah s 340 KTN, kepentingan mana-mana orang dalam hak milik berdaftar adalah tidak boleh disangkal, seterusnya mengukuhkan kesahihan transaksi pajakan dan kepentingan plaintif ke atas hartanah masing-masing (lihat perenggan 57–60).

(5) Skim pajakan persendirian ini tidak melanggar mana-mana tempoh pajakan di bawah KTN dan AHS. Defendan telah memohon hak milik strata dan sememangnya telah dikeluarkan mengikut garis panduan yang ditetapkan oleh APBWPI. Kedua-dua AHS dan KTN tidak melarang penyerahan hak ke atas hartanah oleh pemilik kepada plaintif. PJB telah distrukturkan mengikut garis panduan pemilikan yang ditetapkan oleh APBWPI, mencerminkan pematuhan kepada rangka kerja peraturan. Oleh itu, tuntutan plaintif mengenai pelanggaran KTN dan AHS adalah tidak berasas (lihat perenggan 61, 66, 68 & 70).

(6) Pembelian pajakan ke atas petak-petak oleh plaintif, serta pengecualian daripada penggunaan Jadual H yang diberikan oleh pihak berkuasa, dinyatakan dengan jelas dalam PJB. Prinsip estopel menghalang plaintif daripada mencabar kesahihan terma pajakan apabila mereka telah memperoleh manfaat daripada struktur yang kini ingin mereka pertikaikan. Terma-terma penjualan, termasuk fakta bahawa mereka membeli pajakan, dijelaskan dengan sangat jelas. Plaintif, sebagai pembeli yang memperoleh pinjaman daripada bank, sedar sepenuhnya tentang sifat hartanah yang mereka perolehi. Oleh itu, sebarang tuntutan salah nyata adalah tidak berasas sama sekali (lihat perenggan 71, 74, 76 & 80–81).

(7) Memandangkan milikan kosong hartanah telah diserahkan dengan sewajarnya kepada plaintif masing-masing sejak 2017, rayuan balas oleh plaintif kini telah menjadi akademik (lihat perenggan 90).]

Cases referred to

7-Eleven Malaysia Sdn Bhd v Ashvine Hari Krishnan [2023] 3 MLJ 469; [2023] 4 CLJ 895; [2023] 4 MLRA 252; [2023] 2 ILR 209, CA (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 1 MLRA 524; [2010] 5 CLJ 865, FC (refd)

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281, FC (refd)

Menteri Kesejahteraan Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan Anor v Ang Ming Lee Ors and other appeals [2018] 4 MLJ 545; [2018] 6 MLRA 463; [2018] AMR 438, CA (refd)

Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other appeals [2024] 5 MLJ 897, FC (folld)

Legislation referred to

Housing Development (Control and Licensing) Act 1966

Housing Development (Control and Licensing) Regulations 1989 regs 11, 11(1), (3), 12, Schedule H

Iskandar Regional Development Authority Act 2007 ss 5, 32

National Land Code ss 218, 219, 221, 221(3)(b), 227, 340, Form 14A

Strata Title Act 1985 s 73

Appeal from: Civil Suit No WA-22NCVC-120–03 of 2018 (High Court, Kuala Lumpur)

Lim Chee Wee (with Marcus Tan Seng Peng and Eunice Kwong Sook Wen) (Ricky Tan & Co) for the appellant (defendant).

KL Wong (with Wong Renn Xin) (KL Wong) for the respondent (plaintiff).

Ahmad Kamal JCA:

INTRODUCTION

[1] This is another appeal involving the decision of the High Court revolving around the house development issues on the liquidated ascertained damages ('LAD') for late delivery of vacant possession aftermath the decision of the Federal Court in *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other appeals* [2024] 5 MLJ 897; [2024] 8 CLJ 519; [2024] 6 AMR 813; [2024] 6 MLRA 1 (*Prema Bonanza* case).

[2] However, the uniqueness of this appeal as compared to other cases involving the same issue is that this appeal involves land for a special government key economic corridors project in Iskandar, Johor, where the development does not give ownership to the buyers, but only involves the transfer of the lease.

[3] The High Court allowed the purchasers' claim, thus leading to this appeal by the developer and the cross-appeal by the purchasers. We heard both on 4 February 2025, and after carefully deliberating the records of appeal and considering submissions by both parties, we unanimously decided to allow the appeal and dismiss the cross-appeal. This is now our full grounds of judgment.

BACKGROUND FACTS

[4] In this case, Wong Hang Fah and 106 others ('the plaintiffs') are the purchasers of condominium unit ('the property') in a housing development project known as The Meridin @ Medini ('the project').

[5] Tropika Istimewa Development Sdn Bhd ('the defendant') is the developer of the project which is situated at a freehold land at Medini Iskandar Malaysia, a special economic zone located in Iskandar Puteri, Johor ('the land'). The land is owned by a private corporation known as Iskandar Investment Bhd ('IIB'). IIB has granted a lease to Medini Land Sdn Bhd ('Medini') for a period of 99 years commencing from 15 April 2013 and expiring on 14 April 2112.

[6] The Land Office of Johor and Iskandar Regional Development Authority ('IRDA') have established guidelines for foreign acquisition of properties in Medini Iskandar Malaysia. This guideline was established to regulate the sale and purchase transactions for the projects in Medini Iskandar Malaysia by implementing the concept of a private lease scheme, including the transfer of ownership to foreigners (private lease scheme), given that Medini Iskandar Malaysia is a special project and development.

[7] By a lease purchase agreement dated 18 October 2012 ('the lease purchase agreement') signed between Medini and the defendant, Medini agreed to sell the lease to the defendant upon the terms and conditions stated therein. MB granted the right to the defendant to develop the land as a housing development and to sell the lease on the units to the plaintiffs.

[8] All plaintiffs have made payment of RM10,000 respectively, being an earnest deposit to the defendant to purchase a parcel in the project, including the parking lot, on different dates (as specifically stated in para 80 of the statement of claim ('SOC')).

[9] By a sale and purchase agreement(s) executed between the respective plaintiffs and the defendant ('the SPA') (on the dates as stated in para 81 of the SOC), the defendant agreed to sell the lease of the units (as opposed to a sale of property) to the plaintiffs, upon the terms and conditions as stated therein.

[10] In addition to the SPA, the defendant had also executed a supplemental

agreement (to be read as part of the SPA) with the plaintiffs for the sale of the car park for the consideration sum of RM50,000 upon the terms and conditions as stated therein (supplemental agreement). A

[11] Upon executing the SPA, the plaintiffs progressively paid the balance of 10% of the purchase price, either by cash or by loan financing. B

[12] To cut it short, the plaintiffs later learnt that the SPA entered into between the plaintiffs and the defendant failed to comply with the provisions of the law relating to the housing development, which caused the plaintiffs to incur losses and/or damages. C

IN THE HIGH COURT

[13] The plaintiffs thus instituted a civil suit against the defendant. Based on the SOC, the plaintiffs claim from the defendant the following prayers: D

A. a declaration that the SPA is invalid and/or in contravention of the Housing Development (Control and Licensing) Act 1966 (HDA), the Housing Development (Control and Licensing) Regulations 1989 (HDR), the National Land Code 1965 (NLC) and the Strata Titles Act 1985 (STA); E

B. a declaration that the Defendant is required to comply and shall be bound by the terms and conditions as prescribed in Schedule H of the HDR;

C. an Order that the Defendant shall pay the Plaintiffs damages to be assessed by the Court as a result of the misrepresentation and/or breach of the terms and conditions as prescribed in Schedule H of the HDR; F

D. an Order that the Defendant shall pay the Plaintiffs LAD for late delivery of vacant possession of their units.

[14] In the course of the proceeding in the High Court, 14 out of 107 plaintiffs pursued all claims in the SOC, while others withdrew prayers (A), (B) and (C) against the defendant. G

The plaintiffs' case H

[15] It was the plaintiffs' case that:

(a) the defendant had falsely represented and/or misrepresented to the plaintiffs that:

(i) the defendant has the legal rights to enter into a SPA with the plaintiffs for the sale of a lease over the strata parcels to the plaintiffs; I

(ii) the defendant has the legal rights to grant a lease over the strata

parcels to the plaintiffs for a period ending on 14 April 2112;

(iii) the defendant has the legal rights to execute the transfer of the lease over the strata parcels in the form of the memorandum of transfer (Form 14A) as prescribed under the NLC;

(iv) the plaintiffs can be registered as the lessee of the lease over the strata parcel under the provisions of the NLC and the STA;

(v) separate strata titles will be issued in the name of the plaintiffs as lessee of the lease over the strata parcels for a lease period ending on 14 April 2112;

(vi) valid approval had been given by the relevant authorities to the defendant to vary the prescribed form of a sale and purchase agreement as provided under Schedule H of the HDR; and

(vii) the SPA entered between the plaintiffs and the defendant are in accordance with the provisions of the existing law; and

(viii) As a result of the false representation and/or misrepresentation by the defendant, the plaintiffs had incurred losses and/or damages which the defendant is liable to pay the plaintiffs.

(b) the SPA entered into between the plaintiffs and the defendant failed to comply with the provisions of the existing law and/or was in breach of the statutory form in Schedule H of the HDR. That being the case, any amendments made by the defendant in the SPA inconsistent with the terms and conditions found in Schedule H of the HDR shall be invalid and shall not be binding on the plaintiffs;

(c) the defendant shall be bound by the terms and conditions prescribed in Schedule H of the HDR;

(d) the defendant had acted wrongly and/or in breach of the provisions of the existing laws, ie HDA, NLC, STA and the HDR particulars of which are as follows:

(i) divided the SPA into two separate sale and purchase agreements, ie to the unit and the parking lot;

(ii) amended the prescribed form of the SPA for the property as provided under Schedule H to a SPA of a lease over the strata parcel;

(iii) the period of the lease parcel contravenes the provision under the NLC and the STA;

(iv) amended the period for delivery of vacant possession from 36 to 48 months;

(v) amended the progressive payment schedule under the SPA for the parking lot, which is not in accordance with the schedule of

progressive payment as prescribed under Schedule H; and

(vi) entering into the SPA for the sale of the lease over the strata parcel with the plaintiffs as lessee of the parcel for a period until 14 April 2112.

(e) premised on the prescribed Schedule H of the HDR, parties shall be bound by the terms and conditions of the SPA as follows:

(i) that the payment of the purchase price shall be payable to the defendant on a progressive basis in accordance with Schedule H, and each progressive payment to the defendant shall be supported by a certificate of completion of works certified by the architect or engineer;

(ii) that the defendant is required to enter into a sale and purchase agreement for the parcel as prescribed under Schedule H and not a sale and purchase agreement for a lease over the strata parcel, which is not provided under the existing law;

(iii) that the defendant is required to enter into one sale and purchase agreement and not two separate sale and purchase agreements for the parcel and the accessory parcel;

(iv) that the defendant is required to deliver the vacant possession of the plaintiffs' unit with common facilities completed within 36 months from the date of the said SPA; and

(v) that the defendant is liable to pay LAD to the plaintiffs at the rate of 10% of the purchase price and 10% of the last 20% of the purchase price to be calculated from the due date of delivery of vacant possession until the actual date vacant possession is delivered to the plaintiffs.

The defendant's case

[16] The defendant contended, among others, that:

(a) the plaintiffs' action is invalid as they had already assigned their rights to the cause of actions to the bank. To terminate the SPA with the defendant is contradictory with the loan agreement and deed of assignment, respectively and/or prejudicial to the securities to the bank and the undertaking to the defendant which were given to the bank before this;

(b) the project is one of the key economic corridor projects in Malaysia. The development of Iskandar Malaysia does not give ownership to the buyers but only involves the transfer of the lease. These are in accordance with the terms and conditions and/or provisions of law and/or the approval of the authorities;

(c) based on a letter dated 16 July 2013 from Jabatan Perumahan Negara, Kementerian Perumahan dan Kerajaan Tempatan ('KPKT') bearing title 'Permohonan Pengubahsuaian Surat Perjanjian Jual dan Beli Serta Pengecualian Peraturan 11, Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Perlesenan) 1989 bagi Pembangunan di Medini, Iskandar Malaysia' ('KPKT's letter'), the defendant had obtained an exemption from complying with the prescribed statutory format under Schedule H that allowed the defendant to sell the lease on the units (instead of a sale of property) to the plaintiffs and for an extension of time to deliver vacant possession from the prescribed statutory period of 36 months to 48 months (see: common core bundle, at p 145 of encl 83). The plaintiffs possessed the knowledge at all material times that the defendant would apply for this exemption, as these were recorded in writing before entry of the SPA; and

(d) the plaintiffs' claims are uncertain and/or the plaintiffs failed and/or neglected to plead the details of the false representation and/or misrepresentation that had allegedly occurred.th

[17] On 7 October 2020, the High Court ruled in favour of the plaintiffs, by granting the following reliefs:

(a) declaration that the SPAs for seventh, eighth, 11th, 19th, 20th, 44th, 45th, 49th, 50th, 57th, 93rd, 94th, and 96th plaintiffs are invalid and contravene the HDA, HDR, NLC, and STA;

(b) declaration that the defendant must comply with the terms in Schedule H of the HDR;

(c) order for the defendant to pay damages for misrepresentation and/or breach of Schedule H of the HDR;

(d) order for the defendant to pay LAD and interest; and

(e) costs of RM30,000 to the first plaintiff.

FINDINGS OF THE HIGH COURT

[18] In arriving at the abovementioned decision, the learned High Court judge ('HCJ') found, among others, that:

(a) in both regs 11(1) and (3) of the HDR, there is no provision for the controller allowing the defendant to enter into the SPA with the plaintiffs for the sale of the lease as opposed to a sale of the property. That being the case, the SPA is in breach of the HDA and HDR;

(b) the SPA for the sale of the lease is for 99 years. However, the supplemental agreement for the car park describes it as a sale of a car park bay rather than a sale of a lease, which contravenes the STA;

(c) the power given to the controller under reg 11(3) does not extend to giving exemptions for non-compliance with reg 11 of the HDR to alter the terms and conditions of the SPA from a sale of a property to a sale of a lease which violates Schedule H;

(d) granting an extension of time to surrender vacant possession before the signing of the SPA is against the spirit as envisaged in reg 11(3) of the HDR because the project has not started, and the reason for asking for an extension of time was premature;

(e) since there is a clear breach of the regulations, the plaintiffs are not estopped from seeking remedy from the court by filing a civil suit as in the Court of Appeal case of *Menteri Kesejahteraan Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan Anor v Ang Ming Lee Ors and other appeals* [2018] 4 MLJ 545; [2018] 6 MLRA 463; [2018] AMR 438; and

(f) the defendant has misrepresented the status of the property to the plaintiffs ie that they had entered into a sale to purchase a property and not a contract to purchase a lease.

THE APPEAL AND CROSS-APPEAL

[19] Dissatisfied with the decision of the learned HCJ, the defendant has since filed the present appeal. It is followed by the cross-appeal by the plaintiffs in encl 41.

[20] In the written submission, the defendant laid down the reasons why the appeal should be allowed, as follows:

(a) second actor theory is engaged in this appeal — the defendant as the second actor obtained and relied upon the KPKT's letter by the Ministry of Housing as well as the guidelines by the authorities (the approvals by the authorities). A defective/invalid decision by the first actor of authorities does not result in an ineffective act by the second actor of the defendant as propounded in the *Prema Bonanza* case;

(b) prospective not retrospective: the Federal Court case of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2019] 6 MLRA 494; [2020] 1 CLJ 162; [2019] 8 AMR 297 (*Ang Ming Lee* case) is to be applied prospectively, not retrospectively as decided in *Prema Bonanza* case;

(c) only direct challenge: the plaintiffs, as strangers, cannot initiate this proceeding as a collateral proceeding to attack the approvals by the authorities and are obliged to challenge directly the same against the first actor of authorities, which they failed to do;

(d) academic: the issues raised by the plaintiffs have been rendered moot following the issuance of the strata title; and

(e) voluntary: the plaintiffs are aware of the private lease scheme and voluntarily entered into the SPA, knowing very well the nature of the transaction.

[21] The plaintiffs, on the other hand, submitted that the issues to be raised are as follows:

(a) issue No 1:
Whether the sale of the lease over the parcel pursuant to the terms and conditions as stated in the SPA is valid under the provisions of the HDA, HDR, NLC and the STA?

(b) issue No 2:
Whether the terms and conditions of the SPA are in breach of Schedule H of the HDR?

(c) issue No 3:
Whether the plaintiffs' claims against the defendant are contradictory to the guidelines for the consent to transfer the property to a foreigner in Medini that were provisioned by the authorities of Medini Iskandar Malaysia, including the Land Office of Johor and IRDA?

(d) issue No 4:
Whether the KPKT's letter dated 16 July 2013 is valid under the laws and, therefore, shall be binding on the plaintiffs?

(e) issue No 5:
Whether the plaintiffs can challenge the KPKT's letter through the High Court suit instead of by way of a judicial review application ('JR')?

(f) issue No 6:
Whether the defendant is liable to pay LAD to the plaintiffs for late delivery of vacant possession and completion of common facilities?

[22] Regarding the cross-appeal, we note that the plaintiffs were claiming a variation to the amount of the LAD that the learned HCJ had granted. For example, for the first and second plaintiff, from RM164,613.64 (as per the judgement) to RM197,318.23 (as per the statement of claim). They complained that the learned HCJ erred when he decided that the LAD should be calculated from the date of the SPA and not from the date of the payment of the deposit.

OUR FINDINGS

Second actor theory

[23] It is to be noted that the private lease scheme, central to this dispute, was expressly contemplated under the IRDA Act 2007.

[24] As mentioned above, Medini Iskandar Malaysia is a special project and development where the Land Office of Johor and IRDA have laid down guidelines on the approval of the acquisition of properties in Medini Iskandar Malaysia.

[25] These guidelines were established to regulate the sale and purchase transactions for projects in Medini Iskandar, Malaysia, by implementing the concept of a private lease scheme, including the transfer of ownership to foreigners.

[26] We take note that the defendant relied heavily on legislation and the authorities' approval to plan its development, to make project contractual commitments, and to make promises on the strength of the written words of the authorities.

[27] The SPA aligns with the policy framework and guidelines established by the IRDA and other relevant authorities, ensuring strict adherence to regulatory mandates.

[28] The defendant's sale of the property under the private lease scheme fully complies with the initiatives approved by the authorities. Additionally, the defendant has obtained the requisite approval from the KPKT to amend the SPA, rendering it compliant with all applicable laws,

[29] Given the above, we are of the considered view that notwithstanding the declaration of invalidity of controller's extension as established in *Ang Ming Lee* case, such a declaration should not retrospectively affect parties who had relied in good faith on the validity of the said extension prior to it being declared unlawful — the second actor theory.

[30] We rely on the recent Federal Court's judgment in *Prema Bonanza* case where it was held as follows:

> [135] *The developer* in this case, Sri Damansara, *relied upon the act of granting the extension. there would be substantial injustice if the act of the developer is found to be void because of the invalidity of the first act by the controller*. As the second and third respondents did not challenge the validity of the EOT approved by the controller before the Tribunal, nor did they mount any challenge in judicial review

proceedings, they cannot therefore initiate a collateral proceeding. *The extended period was granted before the SPA was executed and both the respondents were fully aware of the time of completion*. Hence, the second and third despondents for the reasons we have alluded are not in the position to initiate a collateral proceeding against Sri Damansara.

[136] *The controller had considered the application for extension and granted the extension as the law at that time was valid. The developer had relied on the decision of the controller who had granted the extension. Accordingly, we have no difficulty in holding that the second actor theory applies*. The question posed is therefore answered in the affirmative. (Emphasis added.)

[31] In the instant case, we found that the first act refers to the approval of the extension of time and exemption under reg 11(3) of the HDR. The second act is the SPA in reliance on the Ministry of Housing's extension and exemption's approval as well as the guidelines.

[32] The plaintiffs were informed by the defendant that the defendant was seeking an application to the Ministry of Housing for an exemption from the use of Schedule H of the HDR before entering into the SPA with the defendant through the request for registration form.

[33] When the KPKT's approval was granted, the defendant also informed the plaintiffs of the same through their solicitors' letters in 2013.

[34] After receiving the letters informing them of the authorities' decision, neither of the plaintiffs has filed any appeal or review against the authorities' decision.

[35] Even though the KPKT's approval was declared void following the decision of the Federal Court in *Ang Ming Lee* case in 2019 ie some six years later, however, we are of the view that, it shall not render the second act invalid as there is a reliance on validity of the first act, when the second act was performed.

[36] We found that the defendant, the developer in this case, relied upon the KPKT's act of granting the extension of time to deliver vacant possession. There would be substantial injustice if the act of the defendant is found to be void because of the invalidity of the first act of the controller.

[37] In any event, the plaintiffs in the present case were explicitly aware, prior to executing the SPA, that the sale of the property is by way of lease and the period for delivery of vacant possession had been extended to 48 months from the brochure and also through the request for registration form.

[38] We found that this is not a case where the defendant has failed to fulfil its obligations under the SPA. On the contrary, evidence shows that the defendant delivered vacant possession within the agreed 48 months period specified in the SPA.

[39] In our view, by applying the second actor theory referenced in *Prema Bonanza* case and other relevant authorities, developers, as the second actor, who relied on the KPKT's approvals as well as the said guidelines in good faith, acted lawfully by completing the project within the timeframes expressly stipulated in the SPA. This reliance was unaffected by the subsequent declaration of invalidity of the first act.

[40] To that end, we found that, to declare the second act void solely because of the invalidity of the first act — despite the second actor's honest and reasonable presumption of its validity — would open the floodgates to litigation, cause substantial injustice, and create administrative chaos. In circumstances where such honest reliance exists, the second act should be upheld as valid notwithstanding the legal defects of the first act.

Prospectivity

[41] We found that the learned HCJ had erred in applying the Court of Appeal case of *Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor v Ang Ming Lee & Ors and other appeals* [2018] 4 MLJ 545; [2018] 6 MLRA 463; [2018] AMR 438 and also holding that regs 11(1) and (3) of the HDR do not allow the defendant to enter or alter SPA with plaintiffs for the sale of lease.

[42] This is because the Federal Court in *Prema Bonanza* case decided that *Ang Ming Lee* case is to be applied 'prospectively' when it held as follows:

> [166] Therefore, a careful consideration of the reliance interest is not only necessary but critical. Undoubtedly, laws must be given their full force and effect until they are declared invalid. *An administrative decision made pursuant to a valid legislation before it is declared as ultra vires does not mean that the decision was void ab initio. It remains validly and legally intact.*
>
> [167] We have given our utmost consideration on the facts and the law and we are of the view that, *if Ang Ming Lee is to have retrospective effect, there would be serious ramifications and repercussions to the housing developers that had placed reliance on the existing law and diligently complied with the laws which were at that time valid.*
>
> [168] Therefore, *based on the reasons, we have stated above and the exceptional circumstances involved, the decision of Ang Ming Lee is prospective. To say otherwise that Ang Ming Lee applies retrospectively will result in great injustice and devastating consequences to the housing industry that had diligently complied with the laws before Ang Ming Lee. Thus, the principles enunciated in Ang Ming Lee will not apply to*

extensions granted by the Controller before Ang Ming Lee.

[169] In respect of prospective overruling, we answered as follows:

> Question 1 — Does the doctrine of prospective overruling and the exceptions set out *Re Spectrum Plus Ltd (In Liquidation)* [2005] 2 AC 680 ('Spectrum Plus') apply to Malaysian cases where a courts' decision and/or judicial pronouncement would bring disruptive consequences to an industry as a whole?
>
> Answer: Affirmative

[43] Based on the above, we uphold the validity of the amendments to the SPA, which were made in reliance on the KPKTs approvals, as well as the specific guidelines issued by the authorities.

Direct challenge

[44] The plaintiffs claimed that the controller lacks jurisdiction to grant the exemption under reg 11(1) of the HDR, thus challenging the controller's authority to grant such exemptions.

[45] We are of the view that the controller's authority to grant exemptions under reg 11(1) of the HDR should have been brought through a JR application.

[46] The plaintiffs' claim constitutes a collateral proceeding to short-circuit the law, ie reg 12 of the HDR, which explicitly provides that any person aggrieved by the controller's decision under reg 11 may, within 14 days of being notified of the decision, appeal to the Minister. The Minister's decision thereafter is final and cannot be questioned in any court.

[47] The Federal Court case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 1 MLRA 524; [2010] 5 CLJ 865 underscores that challenges to the exercise of statutory powers must be pursued through JR proceedings, particularly where public law principles are predominant.

[48] Accordingly, any challenge to the validity of KPKT's approval should have been brought through a JR application, with KPKT properly added as a party.

[49] We are also guided by the recent Federal Court's decision in *Prema Bonanza* case, where it was held that purchasers, being mere strangers to the controller's decision, and are not eligible to collaterally attack the controller's extension by initiating collateral proceedings to invalidate the controller's extension, when it held as follows:

[130] We agree with the arguments advanced that the validity of an administrative action may, in exceptional circumstances, be challenged by way of collateral proceedings. *However, in the appeal before us, the second and third respondents are, in actual fact, 'strangers' in the present dispute, and as 'strangers,' they are not eligible to collaterally attack the controller's extension through this proceeding. As explained in Pan Wai Mei, for a collateral attack against the decision of a public decision-maker to succeed, no stranger can be involved in the challenge*. The contest was either between the party that did the invalid act and the victim of the act or between two non-strangers one of whom seeks to rely on an invalid act or decision made by a public decision-maker. Hence, on the facts of *Pan Wai Mei*, it was imperative for the defendant to have launched a frontal assault on the act of the Land Administrator and upon the plaintiff's registered title. In the absence of such an attack, there was no arguable defence to the plaintiff's claim.

[131] *In this case before us, the proper parties are the controller who performed the administrative action, and Sri Damansara who relied on the administrative decision. The second and third respondents as the purchasers do not fall within the two categories of parties entitled to initiate collateral proceedings to invalidate the controller's extension*. Moreover, the collateral proceeding can only be used as a defence rather than an attack. In *Pan Wai Mei*, the Court of Appeal ruled that:

> [10] The foregoing general rule is subject to the doctrine of collateral attack. In proceedings brought in reliance of an invalid act or decision, a defendant or an accused may plead the invalidity by way of defence in civil or criminal proceedings.

[132] *Hence, the second and third respondents in this case cannot initiate this collateral proceeding, as they are using it as an attack against Sri Damansara (who is the developer and the second actor) as opposed to a defence. There was no direct challenge against the controller's decision to grant the extension by way of judicial review. Thus, it shall not render the second act invalid as there is a reliance on the validity of the first act when the second act was performed.* (Emphasis added.)

[50] We are of the view that since the Parliament has put in place a statutory mechanism and/or process and stipulated the remedies that the statutory tribunal could give, then that is the process and/or remedy that must be pursued.

[51] The Court of Appeal in *7-Eleven Malaysia Sdn Bhd v Ashvine Hari Krishnan* [2023] 3 MLJ 469; [2023] 4 CLJ 895; [2023] 4 MLRA 252; [2023] 2 ILR 209 held as follows:

> [52] Indeed, since Parliament has enacted the Act (Industrial Relations Act 1967), it is relevant to ask whether a dismissed employee can choose to circumvent the statutory process by filing a civil claim on the argument that he/she can do so since the Act has not ousted the jurisdiction of the civil court? Of course, the Act does not say that the jurisdiction of the civil court has been ousted. But that does not mean that the statutory process under the Act can be avoided or disregarded.
>
> [53] *In our view, if Parliament (per the Act) has put in place a statutory*

mechanism/process and stipulates the remedies that the statutory tribunal can give, then that is the process/remedy that must be pursued ... (Emphasis added.)

[52] We are of the view that the plaintiffs' claim of deprivation of the rights to be heard is without merit, and the plaintiffs are estopped from raising this argument and/or disputing the validity of the KPKT's approval, as the underlying basis for its issuance was never contested.

[53] This can be gleaned from the evidence given during the cross-examination of the Ministry of Housing's representative, Dato' Jayaselan a/l K Navaratnam (DW2). We found that the plaintiffs' counsel did not challenge the basis upon which the KPKT's approval was issued.

[54] The plaintiffs' solicitors were afforded the opportunity to peruse the committee minutes, which confirmed that the Ministry of Housing had granted approval for the extension and exemption. However, after perusing the minutes, the plaintiffs' counsel chose not to raise any questions regarding the approval.

[55] At all relevant times, there has been no declaration that the approval is null and void by reason of want of jurisdiction, until the decision rendered by the High Court and the ruling in *Ang Ming Lee* case.

[56] Given the above, we are of the view that the contentions raised by the plaintiffs underline our findings that the second actor principle should apply, and any challenge to a decision made by a public authority must be pursued through JR proceeding.

Validity of SPA

Strata title issued by the Local Authority

[57] We are of the view that the issuance of the strata title to the plaintiffs, which formally recognises them as leaseholders for a term of 99 years, nullifies the plaintiffs' claim on the legality of the sale of the lease. This act of registration, coupled with the clearly defined nature of the leasehold, renders the objections raised by the plaintiffs entirely academic and devoid of merit.

[58] Further, we are of the view that it was wrong for the plaintiffs to consider themselves as the sub-lessees and claim that the SPA is in contravention of s 221(3)(b) of the NLC based on the following grounds:

(a) s 221 of the NLC grants power to the proprietors (in this case, IIB) to

grant a lease for a maximum term of 99 years over the land on which the Project Meridin was built;

(b) the lease was granted to Medini Land Sdn Bhd, which was subsequently sold to the defendant. These facts were ail stated under the recitals of the SPA; and

(c) pursuant to ss 218 and 219 of the NLC, the lease can be transferred and the interest of any lessee shall pass and vest in the transferee upon registration of the transfer. The lessees' interest, as defined under s 227 of the NLC, includes all registered interests attached to the land.

[59] Therefore, the plaintiffs' claim that they have been misrepresented and did not obtain the proprietorship of the property cannot be true.

[60] Further, we found that under s 340 of the NLC, the interest of any person in a registered title is indefeasible, further solidifying the legitimacy of the lease transaction and the interests of the plaintiffs over their respective property.

No contravention of the NLC and STA

[61] We found that this private lease scheme does not contravene any lease periods under the NLC and the STA. This can be proven by the fact that the defendant has applied for the strata title and has indeed been issued following the guidelines set by the IRDA.

[62] IRDA was incorporated to provide for the proper direction, policies and strategies in relation to development within the Iskandar Development Region, to provide for coordination between government agencies to promote trade, investment and development within the Iskandar Development Region, and to provide for matters connected therewith or ancillary thereto.

[63] Section 5 of the IRDA Act 2007 outlines IRDA's functions, including establishing policies and ensuring compliance within the region:

5 Functions of the Authority

The functions of the Authority shall be

(a) *to establish national policies, direction and strategies in relation to development within the Iskandar Development Region* and other functions in connection therewith as provided in Part IV

(b) to co-ordinate the performance of the activities carried out by Government Entities in the Iskandar Development Region as provided in Part V including —

(i) to act as a principal co-ordinating agent or authorized agent in relation to applications for Approvals in respect of which the Authority has entered into an agreement or arrangement under Section 31;

(ii) *to recommend uniform standards, guidelines, best practices and administrative processes and procedures to be used by Government Entities for the Iskandar Development Region*; and

(iii) *to monitor the implementation of uniform standards, guidelines, best practices and administrative processes and procedures in facilitating the development of the Iskandar Development Region*;

...

(d) to *recommend to the relevant Government Entities policies, laws and actions to be applied to the Iskandar Development Region* to enhance the international competitiveness of industry and commerce in the Iskandar Development Region,

... (Emphasis added.)

[64] The relevant guidelines were issued by the IRDA and certified by the Johor Land Authorities. These guidelines, being public documents, unequivocally establish that the concept of ownership in Medini is premised upon a lease.

[65] Further, reference is made to s 32 of the IRDA Act 2007 which states:

32 Responsibility of Government Entities

It shall be the responsibility of every Government Entity to —

(a) co-operate with and assist the Authority in the performance by the Authority of its functions under this Act;

(b) where relevant, refer and utilise the information, statistics and factors disseminated by the Authority under paragraph 5(c) in the performance of its functions and duties, in the exercise of its powers, and in the carrying out of its activities, within the Iskandar Development Region; and

(c) give due consideration to proposed policies, laws, and actions to be applied to the Iskandar Development Region as recommended by the Authority under paragraph 5(d).

[66] We found that both the STA and the NLC do not prohibit the assignment of rights over the property by the proprietor to the plaintiffs.

[67] In fact, s 73 of the STA explicitly states:

73 Other rights and remedies not affected by this Act

> Nothing in this Act shall affect any other rights or remedies which a proprietor or chargee of a parcel or a management corporation may have, in relation to any parcel or the common property, conferred by any other written law.

[68] As the second actor, the defendant has duly relied on these guidelines, policies, and the approval granted by the relevant authorities. In doing so, the defendant is bound by the framework set forth by the authorities. Accordingly, we are of the view that the SPA has been structured in compliance with the ownership guidelines established by IRDA, reflecting adherence to the regulatory framework.

[69] Without the KPKT's approval, the defendant would not, and indeed could not, have entered into such an agreement. Had the SPA contravened any existing laws, the relevant approvals including the extension and exemption letter as well as the advertising permit and developer license, would not have been issued to the defendant, nor would the authorities have issued the strata title.

[70] In light of the foregoing, we are of the considered view that the plaintiffs' claims of breach of NLC and STA are devoid of merit. The issuance of the strata title, the approval from the authorities, and the transfer of the lease interest were all carried out in compliance with the law, leaving no room for further dispute.

Affirmation by the purchasers

[71] The plaintiffs' purchase of the leases over the parcels, as well as the exemption from using Schedule H granted by the authorities, were clearly specified in the SPA.

[72] The plaintiffs were also aware that Medini is a designated special economic zone governed by the IRDA, which implements the private lease scheme. This regime, specifically designed for the Medini Iskandar project, is intended to attract foreign investment by offering various incentives. Among these, the exemption from the RM1m property price threshold and lifting the quota restrictions for property transfers are particularly relevant. The plaintiffs, by participating in this project, benefited from these very exemptions, further confirming their awareness and acceptance of the unique conditions surrounding their purchase.

[73] It is apparent that the plaintiffs, having enjoyed the benefits of the special regime, including the exemptions from the RM1m threshold and property transfer quotas, cannot assert that the sale of lease is invalid. This constitutes a clear contradiction.

[74] The principle of estoppel prevents the plaintiffs from challenging the validity of the lease terms when they have already benefited from the very structure they now seek to dispute. They cannot take advantage of the benefits of the scheme while simultaneously rejecting the foundational terms under which those benefits were granted.

[75] Further, we found that the plaintiffs' claim of misrepresentation is unsupported by the facts. The plaintiffs did not produce any evidence to prove that during the transaction, they were misled regarding the nature of the property they were purchasing. Therefore, it is unsurprising that the plaintiffs' counsel has not made any submission to support their claim of misrepresentation.

[76] On the contrary, we found that the terms of the sale, including the fact that they were purchasing a lease, were made abundantly clear. The recitals of the SPA are clear that the plaintiffs were purchasing a lease. The principles of caveat emptor shall apply, and the plaintiffs cannot dispute the nature of the transaction.

[77] The plaintiffs' argument is further undermined by their own admission during the cross-examination of their sole witness, Mr Wong Hang Fah ('PW1'). PW1 admitted that their primary intention was to claim LAD only emerged much later, on 21 May 2018:

> Q: Basically, your complaint today is what you bought, what you wanted to buy in 2013 and what you actually realized you have bought in 2017 was totally different, That was your main contention, is that true?
>
> A: Well, it started off with us as a group wanting ...
>
> Q: No, no just you, I just want to know you?
>
> A: Yes, yes, okay, I am just explaining, wanting to claim the liquidated damage because I signed on the S&P for thirty six (36) months.
>
> Q: So basically you want to claim the LAD and it is not because of your complain about whether it is a Lease or Leasehold? I mean are you saying that?
>
> A: But in the process, we found out that there is in a way, based on what is written in the S&P differs from what I had in my ... I am buying back in 2013.
>
> Q; So do you agree that you only realized you did not buy what you bargain for in 2018 when you talked to him (Dato' KL Wong)?
>
> A: Yes, 21st May 2018.
>
> (See: encl 8, as at p 131, lines 3 to 19.)

[78] It is clear that the dispute stems from the aftermath of *Ang Ming Lee* case since the High Court's judgment on 15 June 2017, wherein the plaintiffs now

seek to exploit a situation they were well aware of since 2013, claiming misrepresentation long after the fact. We found that the plaintiffs' belated objection was nothing more than a mere afterthought.

[79] More importantly, we found that PW1 affirmed that he was purchasing a lease in representations made to the bank. During cross-examination on 24 September 2018, PW1 acknowledged his representation to the bank, as follows:

> Q: Now I will refer you to the 'RECITALS', No (1), paragraph (c). Can you please read it silently? Now my question to you, do you agree that you have represented to the Bank that you are buying a Lease from the Defendant in this case, following the 'RECITALS', do you agree?
>
> A: Well it looks like I am buying a Lease.
>
> Q: My question is, do you agree that you have represented to the Bank that you are buying a Lease from the Defendant, you can agree or you do not agree?
>
> A: I agree, from what I have seen here.
>
> Q: Can you turn page 5 of the same Bundle now. I point you to Clause (2.2). Can you read to the Court what is the definition of a 'Lease', underneath the bottom here?
>
> A: Definition of a Lease is,
>
> 'The remaining tenure of the 99 years' lease commencing from 15-042013 over the Property'.
>
> Q: So you are telling the Bank that you are buying a Property, a Lease of a Property and you have taken a loan from the Bank in this case, correct?
>
> A: Yes.
>
> (See: encl 8, as at p 24, lines 6 to 26.)

[80] Based on the above, we are of the view that the plaintiffs, as purchasers who secured a loan from the bank, were fully aware of the nature of the property they were acquiring. Their claim at this juncture is clearly an afterthought, designed to exploit a legal opportunity after they had long entered into the agreement with full awareness of the terms.

[81] The plaintiffs were fully aware of what they were purchasing and were given ample opportunity to review the terms before proceeding to sign SPA. Therefore, any claim of misrepresentation is entirely unfounded.

[82] It is to be noted that the vacant possession of the property was duly delivered to the respective plaintiffs since 2017, and this is an undisputed fact. Since that time, they have enjoyed the ownership of the property.

Other related issues

[83] The plaintiffs submitted that the defendant has no proprietary interest in the land (including the parcel and car park). Therefore, the defendant cannot enter into any form of agreement with the plaintiffs for the sale of the car park (as opposed to a sale of a lease).

[84] The plaintiffs also submitted that this court ought also to consider the issue that the sale of the lease over the parcel in the present case would result in the plaintiffs not being able to participate in the management corporation ('MC'). It renders the MC to be non-functional.

[85] We found that these two issues were not pleaded by the plaintiffs in their pleadings. As such, these contentions are not before the court and in accordance with the established legal principles, they will not be considered in this present appeal.

The cross-appeal

[86] Regarding the cross-appeal, as mentioned in para [22] above, the plaintiffs are claiming a variation to the amount of the LAD granted by the learned HCJ. This is, according to the plaintiffs in para (b) of the cross-appeal, on the ground that the learned HCJ erred when he found that the LAD should be calculated from the date of the SPA and not from the date of the payment of the deposit.

[87] The variation sought was based on the amount stated in the statement of claim, which we noted that, is based on a calculation from the date the deposit was made.

[88] However, we also noted that, the grounds of judgment of the learned HCJ had stated the following:

> The court also noted that at the outset of the trial it was made known to the court that the plaintiffs had initially wanted to claim for the LAD from the date of the payment of the booking fees but midstream had abandoned this assertion and was contended to claim for the LAD from the date of the signing of the S&P till date of vacant possession.

[89] We believe that is the reason why the learned HCJ allowed the plaintiffs' claim but varied the LAD amount as claimed in the statement of claim, ie from RM197,318.23 (as stated in the statement of claim) to RM164,613.64 (note — example is given based on the first and second plaintiffs' situation). The plaintiffs cannot now claim the other way around and blow hot and cold to go back to square one through this cross-appeal.

[90] Anyhow, in light of our earlier finding that the vacant possession of the property was duly delivered to the respective plaintiffs since 2017, the cross-appeal by the plaintiffs has now become academic.

CONCLUSION

[91] As a conclusion, we are of the considered view that the aftermath of *Ang Ming Lee* case has not only jeopardised the defendant's rights whom had relied on the KPKT's approval but also the guidelines published by the IRDA whom governs the Medini Iskandar Development region. It also affected the rights of the other developer and the whole development.

[92] Every developer intending to develop a project in Medini Iskandar, including the defendant, was mandated to adhere to this private lease scheme as established in the guidelines.

[93] To assert that the private lease scheme is in contravention of the laws would be to disregard the very advantages granted to the plaintiffs under the regime they knowingly entered into.

[94] Based on the reasons above, we found that the learned HCJ erred in allowing the plaintiffs' claim against the defendant.

[95] We therefore unanimously set aside the decision of the High Court dated 7 October 2020. The defendant's appeal is hereby allowed, and following that, the plaintiffs' cross-appeal in encl 41 is dismissed. We also order costs of RM80,000 to be paid by the first plaintiff to the defendant, subject to allocator.

Appeal allowed and cross-appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh